Supreme Court, U.S.
FILED

011151 OCT - 2 2001

OFFICE OF THE CLERK

DOCKET NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

In re: CARL RICCITELLI, Debtor

CARL RICCITELLI, Plaintiff/Appellant/Petitioner

v.

GREEN MOUNTAIN POWER CORP.,
WILSHIRE CREDIT CORP. and
GIRARD SAVINGS BANK n/k/a FIRST BANK OF BEVERLY HILLS, Defendants/Appellees

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Filed by Lisa Chalidze, Esq.
626 Rte 4W
Castleton VT 05735
(802) 265-9910
Counsel Of Record
For Petitioner Carl Riccitelli

34 pp

QUESTION PRESENTED

The question presented is whether in a Chapter 13 bankruptcy case a Debtor, rather than the case Trustee, has standing to prosecute claims to augment the bankruptcy estate. This issue directly implicates the subject matter jurisdiction of a federal court to hear such a case, in that standing goes directly to the Article III "case or controversy" requirement of the US Constitution.

The Bankruptcy Code establishes that all property of a debtor becomes property of the bankruptcy estate. Pursuant to 11 USC sec. 323(a) and (b), the Trustee is the representative of the estate and has capacity to sue and be sued. The Bankruptcy Code itself is silent as to whether a debtor retains the capacity to sue others when a cause of action belongs to the bankruptcy estate.

Jurisdictions differ on a debtor's standing to prosecute causes of action. The US Court of Appeals for the Second Circuit has taken differing positions on the issue depending upon the Code chapter under which the debtor has filed for relief, and has expressly refrained from expressing an opinion on whether a Chapter 13 debtor, rather than his Trustee, may prosecute a cause of action that augments the estate.

In the case at bar the Second Circuit, notwithstanding its own expressed lack of resolution on the issue of whether a Chapter 13 debtor may prosecute such a claim, failed

to examine adequately federal subject matter jurisdiction in spite of the admitted augmentation nature of the cause of action in question. Instead, it affirmed the ruling of the Bankruptcy Court without reaching the issue of subject matter jurisdiction by asserting in conclusory fashion that the damage claim was not part of the case under Title 11, even though under the confirmed plan the proceeds of the damage claim were to fund the plan, and the suit also sought to invalidate a lien.

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES CITED	iv
TABLE OF APPENDICES	v
CITATIONS OF REPORTED OPINIONS BELOW: NONE	
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	2
ARGUMENT	3
AUTHORITIES INVOLVED IN CASE	8
APPENDIX: A OPINION ENTERED IN CONJUNCTION WITH THE JUDGMENT SOUGHT TO BE REVIEWED	9
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUMMARY ORDER	1a
DECISION AND OPINION ENTERED BY THE U.S. DISTRICT COURT (VERMONT)	1b
U.S. DISTRICT COURT (VERMONT) DECISION	1b(a)

TABLE OF AUTHORITIES CITED

U.S. Constitution, Article III 8

11 U.S.C. sec. 323 1

28 U.S.C. sec. 1334(b) 5

TABLE OF APPENDIX

APPENDIX : OPINON ENTERED IN CONJUNCTION WITH THE JUDGMENT SOUGHT TO BE REVIEWED 9

APPENDIX - A United States COURT OF APPEALS FOR THE SECOND CIRCUIT - Summary Order 1a

DECISION AND OPINION ENTERED BY THE UNITED STATES DISTRICT COURT (VERMONT) 1b

UNITED STATES DISTRICT COURT(VERMONT) DECISION 1b(a)

STATEMENT OF JURISDICTION

The instant Petition challenges the subject matter jurisdiction of the federal courts to enter the opinions below. If there is subject matter jurisdiction below, it is by virtue of 28 U.S.C. sec. 1334(b) according to US District Courts non-exclusive jurisdiction over matters arising in cases brought under Title 11 of the United States Code. This Honorable Court has jurisdiction over the appeal, if there is federal subject matter jurisdiction, by virtue of the U.S. Constitution, Article III, Section 2. Appeal is taken from the Summary Order of the United States Court Of Appeals for the Second Circuit dated July 5, 2001.

STATEMENT OF THE CASE

This lawsuit originated as an Adversary Proceeding in the context of a Chapter 13 bankruptcy reorganization. Throughout this litigation the only plaintiff has been the debtor, Carl Riccitelli. The causes of action asserted in this Adversary Proceeding arose post-petition, in relation to a fire that burned down Debtor's home approximately two years after he filed his Voluntary Petition on Jan. 13, 1995. The instant lawsuit attributes the cause of the fire to Defendant Green Mountain Power's tortious conduct, and alleges that Defendant Girard Savings Bank (k/n/a First Bank of Beverley Hills) and/or its servicing agent Wilshire Credit Corp. (hereinafter collectively "Wilshire) engaged in tortious conduct involving, *inter alia*, the insurance proceeds from the fire. *The Amended Modified Plan in the Chapter 13 main case, as confirmed, directs the net non-exempt proceeds of this lawsuit to the unsecured creditors and allowed secured creditors.* If these claims are property of the estate and/or augment the estate, then Mr. Riccitelli as debtor lacks standing to pursue them because they are subject to disposition only by the Chapter 13 Trustee. If the named plaintiff does not have standing, then the Bankruptcy Court lacked subject matter jurisdiction over the Adversary Proceeding due to plaintiff's lack of standing.

The Bankruptcy Court originally extended jurisdiction under the "arising in"

provision of 28 USC §1334(b), which states in full: "Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [US Bankruptcy Code], or arising in or related to cases under title 11."

ARGUMENT

The United States Court Of Appeals for the Second Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. The question presented is whether a Chapter 13 debtor, as opposed to his Trustee, has standing to advance the claims in the instant case. This is an important question for two reasons: 1) it has administrative implications for the Bankruptcy Courts, US District Courts, and US Appeals Courts in terms of which cases may or must be prosecuted by a trustee in bankruptcy; and 2) it raises a constitutional question as to whether the Bankruptcy Courts are routinely exceeding their subject matter jurisdiction – and hence violating the US Constitution – by permitting debtors to prosecute such claims and entering orders adjusting debtor-creditor rights in such cases without the constitutional authority to do so.

The doctrine of standing focuses on the party, not the claim, and refuses to consider a legal claim on the ground that, even though the claim may be meritorious, the litigant advancing it is not

properly situated to raise it before the court. Only the trustee as representative of the estate is entitled to assert contract or other legal rights formerly of the bankrupt if they are property of the estate.

The US Court of Appeals for the Second Circuit has expressly declined to state an opinion, on the facts before it, as to whether a Chapter 13 debtor has concurrent standing with his trustee to pursue claims that augment the estate. At least one jurisdiction, however, has held that a creditor who purchased property of the debtor at a tax sale was held not to have standing through the debtor as predecessor in interest to invalidate the liens as violations of the automatic stay because the Bankruptcy Code confers the power of avoidance on the trustee (or debtor-in-possession), and thus a creditor could bring such an action only if she had been granted authorization by the Bankruptcy Court to act as Trustee; certain other actions, however, have been held to be subject to prosecution by either the debtor or the Trustee.

In the case at bar, a significant part of what Mr. Riccitelli has been trying to accomplish is indeed an augmentation of the estate. This augmentation could come about in two ways. First, the creditors would benefit from a damages recovery as provided in the confirmed Plan (unlike in the more common Chapter 13 scenario where the plan is funded solely by earnings of the debtor) because the Plan provides that the net non-exempt proceeds go to the unsecured and allowed secured creditors. Second, part of the instant lawsuit is an avoidance of the lien asserted by Defendant Wilshire, which appears to be or to speak for the singlest largest creditor in the case. Debtor has

always contested Wilshire's lien, listing it as "Disputed, contingent, unliquidated".

In addition to straight damage claims sounding in both contract and negligence, Mr. Riccitelli has requested that Wilshire's claim be equitably subordinated to that of all other creditors, that consequential damages caused by Wilshire be applied as a set-off to Wilshire's claim, and that the insurance proceeds recovered by Wilshire from the insurance carrier be recouped. Indeed, Mr. Riccitelli expressly asked the court to order Wilshire to pay over to Mr. Riccitelli "or his Trustee" all insurance proceeds received to date. The Second Circuit noted that the debtor lacked standing to pursue an equitable subordination claim and therefore dismissed the appeal as to that claim. It failed, however, to continue the analysis and determine whether debtor also lacked standing to pursue damage claims and effectuate a lien avoidance that would both augment the estate.

The standing requirement is not merely a rule of practice, but rather is constitutionally predicated and must be met. Article III of the US Constitution, Section 2, states: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State

claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." This section empowers federal courts to hear only cases and controversies, which do not exist absent a party with standing asserting the claims.

Though some elements of the standing doctrine express mere prudential considerations that are part of judicial self-government, the core component of standing is an unchanging part of the case-or-controversy requirement of Article III. The Constitution confines the jurisdiction of the federal courts to cases or controversies. The standing requirement is an essential preliminary to reaching the merits of the claim, focusing on the party seeking to get his complaint before a federal court, not on the issues he wishes to have adjudicated. The standing doctrine serves to identify the disputes that qualify as "cases" or "controversies" within the reach of Article III.

The standing requirement extends to jurisdiction to enter summary judgments. Indeed, standing is an irreducible constitutional minimum. Simply put, if a plaintiff lacks standing, the court lacks judicial power to entertain the claim presented, and any decision by a court lacking subject matter jurisdiction is a nullity, void ab initio. A federal court is not at liberty to overlook limitations on its subject matter jurisdiction. A court cannot write its own jurisdictional ticket, but must act within the confines of constitutional as well as statutory limits on its jurisdiction.

Thus if in a Chapter 13 case only the Trustee, and not the debtor, has standing to prosecute a claim that augments the bankruptcy estate, then the Bankruptcy Court in the case at bar lacked subject matter jurisdiction to enter summary judgment, which judgment was void *ab initio*.

AUTHORITIES INVOLVED IN CASE

U.S. Constitution, Article III, Section 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

28 U.S.C. sec. 1334(b):

"Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [US Bankruptcy Code], or arising in or related to cases under title 11."

CONCLUSION

For the foregoing reasons, the petition for writ of Certiorari should be granted.

Respectfully submitted:

Lisa Chalidze, Esq.
626 Rte 4W
Castleton VT 05735
(802) 265-9910
Attorney for Petitioner

APPENDIX

DOCKET NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

In re: CARL RICCITELLI,
Debtor

CARL RICCITELLI,
Plaintiff/Appellant/Petitioner

v.

GREEN MOUNTAIN POWER CORP.,
WILSHIRE CREDIT CORP. and
GIRARD SAVINGS BANK n/k/a FIRST
BANK OF BEVERLY HILLS,
Defendants/Appellees

ON PETITION FOR A WRIT OF
CERTIORARITO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND
CIRCUIT

Filed by Lisa Chalidze, Esq.
626 Rte 4W
Castleton VT 05735
(802) 265-9910
Counsel Of Record
For Petitioner Carl Riccitelli

APPENDIX A TO PETITION FOR WRIT OF CERTIORARI

OPINION ENTERED IN CONJUNCTION WITH
THE JUDGMENT SOUGHT TO BE REVIEWED

APPENDIX A: OPINION ENTERED WITH THE JUDGMENT SOUGHT TO BE REVIEWED ___ UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDEDNTIAL AUTHORITY TO THIS OR ANY OTHER COURT , BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5th day of July, two thousand one.

Present : HON. DENNIS JACOBS,
HON.FRED PARKER,
HON.SONIA SOTOMAYOR
Circuit Judges

---------- x

In Re: CARL RICCITELLI,
Debtor,

Seal USCA 2nd Circuit Jul5,2001
Roseann R. MacKechnia, Clerk

CARL RICCITELLI,

Plaintiff - Appellant,

-v.- 00-5085

U.S. Trustee, Jan M. Sensenwich, Chapter 13 Trustee,

Trustees,

GREEN MOUNTAIN POWER CORP., WILSHIRE CREDIT CORP., GIRARD SAVINGS BANK,

Defendants - Appellees.

- x

APPEARING FOR APPELLANT: Lisa Chalidze, Rutland, VT

APPEARING FOR APPELLEES : Donald J. Rendall, Jr., Sheehey Furlong Rendall & Behm P.C., Burlington, Vt for defendant - appellee Green Mountain Power Corp.

Gordon C. Gebauer, Gebauer Shoup & Collias Pc, Burlington, VT for defendants- appellees Wilshire Credit Corp. and Girard Savings Bank

Appeal from the United States District Court for the District of Vermont (Murtha, C.J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the appeal is in part

DISMISSED, and in remaining part the judgment of the district court is **AFFIRMED.**

Carl Riccitelli appeals from the judgment of the United States District Court for the District of Vermont (Murtha, C.J.) affirming the decision of the Bankruptcy court for the district of Vermont, which granted summary judgment dismissing an adversary proceeding commenced by Riccitelli alleged that his cabin burned down by reason of the negligence of defendant-appellee Green Mountain Power corporation in resuming the interrupted supply of power, and that the mortgage holders, defendants - appellees Wilshire Credit corporation and Girard Savings Bank, breached a duty in failing to procure fire insurance.

In June 1988, Ricitelli financed the purchase of property in Wilmington, Vermont by a $196,000 mortgage that was later assigned to Girard Savings Bank, administered by Wilshire Credit Corporation (collectively, "lenders"). In March 1995, Riccitelli entered bankruptcy. During the pendency of the bankruptcy proceeding, a cabin located on the property burned down.

Riccitelli, an electrician, had attempted to repair a malfunctioning water heater in the cabin in December 1995, and used an extension cord to wire the heater directly into the cabin's main circuit breaker. Sometime thereafter, Green Mountain cut off his electrical service for failure to pay bills, and in July 1996,Riccitelli moved to San Francisco.

Riccitelli's brother later broke in, occupied the cabin without permission, and directed Green Mountain to

restore power. On November 22, 1996, several days after the brother (also an electrician) activated the main circuit breaker, the cabin burned down. The cause of fire was never determined, but Riccitelli blames the restoration of power to the water heater.

Riccitelli concedes on appeal that he lacks standing to bring the claim seeking equitable subordination of the lenders' secured claims against the estate. See 11 U.S.C. § 510. The purpose of equitable subordination is to remedy wrongdoing by one creditor, in the interests of the remaining creditors; as a debtor, Riccitelli has no standing to seek relief under § 510. See In re Lockwood, 14B.r. 374, 381 (Bankr. E.d.N.Y. 1981) ("The proper party to seek equitable subordination is the trustee."); see also In re Weeks, 28 B.R. 958, 960 (Bankr. W.D.Okla. 1983) ("The fundamental aim of equitable subordination is to undo or offset any inequality in the claimed position of a creditor that will produce injustice or unfairness to the other creditors in terms of the bankruptcy results.") (internal citation and quotation marks omitted). We therefore dismiss Riccitelli's claim for equitable subordination. Riccitelli does have standing, however, to press his claims for damages. See Olick v. Parker & Parlsey Petroleum Co., 145 F. 3d 513, 515 (2d Cir. 1998) (per curiam) ("a Chapter 13 debtor ... has standing to litigate causes of action that are not part of a case under Title 11").

As to the claim against Green Mountain, the Bankruptcy Court concluded that Riccitelli failed i) to demonstrate that Green Mountain breached a duty of care owed to him, or ii) to present evidence from which a jury could conclude that Green Mountain was the proximate cause of the fire. The district court affirmed on both grounds. We affirm on the independently sufficient ground that the utility, having cut

off the power for failure to pay and without a direction by Riccitelli to end service , breached no duty in resuming it.

As to the claim against the lenders, the bankruptcy court concluded that the lenders never agreed to insure the property. The district court affirmed. After reviewing the documents at issue, we affirm. The mortgage provides: "Borrower shall keep ...the Property insured against loss by fire." The mortgage documents permit the lenders to purchase insurance, presumably to protect their own interest in the property, but they impose no duty on the lenders to purchase insurance to protect the borrower's interest.

We tax costs against Riccitelli, pursuant to Fed. R. App. P. 39, but deny Green Mountain's and Wilshire's motions for damages made under Fed. R. App. P. 38.

For the reasons set forth above, the appeal is hereby in part **DISMISSED**, and in remaining part the judgment of the district court is **AFFIRMED.**

FOR THE COURT :
ROSEANN B. MACKECHNIE, CLERK
By:"s/ Lucille Carr,
Deputy Clerk
Lucille Carr, Deputy Clerk

APPENDIX A: UNITED STATES DISTRICT COURT - DISTRICT OF VERMONT

MEMORANDUM OF DECISION

CARL RICCITELLI

V. CIVIL No. 1:00cv297

GREEN MOUNTAIN POWER CO.
WILSHIRE CREDIT CORP. AND
GIRARD SAVINGS BANK

MEMORANDUM OF DECISION

I.Background

The District Court has jurisdiction over appeals from final judgments of the Bankruptcy Court. 28 U.S.C.§158 (a). The Bankruptcy Court's grant of summary judgment constitutes a final judgment subject to de novo review. [1]See,e.q.,MellonBankN.A. v. United Bank Corp., 31 F. 3d 113, 115 (2nd Cir.1994); Gravel and Shea v. Vermont Nat'l Bank , 162 B.R. 961, 964 (D.Vt.1993)

Summary judgment is properly granted "if the pleadings, depositions answers to interrogatories, and admissions on file, together with affidavits . . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R. Civ.P. 56 (c). Upon review, the Court

---

[1] One of debtor's arguments on appeal is that Judge Conrad failed to review all his submissions prior to rendering his decision on Girard Savings Bank's and Wilshire Credit Corp.'s Motions for summary Judgment. See, e.q. Appellant's Brief on Appeal (Paper 11) at 1 et seq. This Court's de novo review of the entire record renders this argument moot.

must view the facts and inference therefrom in a light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, a party cannot "rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." Knight v. U.S. Fire Ins.Co., 804 F. 2d 9, 12 (2d Cir.1986), cert. denied, 480 U.S. 932 (1987). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477U.S. 242,247- 48 (1986) (emphasis in original).

In light of this standard and upon de novo review, the Court sets forth the following facts. The debtor, Carl Riccitelli, a licensed electrician, owns two lots in Wilmington, Vermont. On the front parcel is a completed log home; on the back parcel is a partially completed house.

In June 1988, the debtor borrowed $196,000 from Prudential Home Mortgage Company to purchase the Wilmington parcels. By June 1996, the debtor's loan and mortgage had been assigned to Girard Savings Bank. Wilshire Credit Corp. administered the debtor's loan both for Prudential and Wilshire Credit.

In December 1995, the water pipes to the log cabin's water heater froze and broke. To test whether the heater still worked, the debtor used an extension cord to connect the heater directly to the circuit breaker panel. He then turned on the circuit breaker and determined that the water heater's coils were still operable. He turned off the breaker; however, he did not disconnect the extension cord from the circuit panel because he wanted to work on the appliance later. The water heater remained so connected to the panel until the time of the fire at issue.

In July 1996, the debtor moved to San Francisco. At the time of his move, Green Mountain Power had turned off the log cabin's electricity for failure to pay outstanding bills.

Occasionally, the debtor's brother George Riccitelli, had lived with him in Wilmington. George like Carl is also an electrician.

Before the debtor left for California, he told his brother to stay out of his cabin. In a past winter, George had caused a fire when he attempted to use the water heater before thawing frozen pipes attached to it. For this reason, the debtor felt George was "too much of an idiot" and would "burn [his cabin] down" if he stayed there unsupervised.

In addition, the debtor had secured a restraining order barring his brother from entering his property. Significantly, before leaving Vermont, the debtor never informed Green Mountain Power that he secured a restraining order, that his brother had no permission to enter his property, or that the company should not turn on the power if requested to do so.

On or about March 8, 1995, the debtor submitted to the Bankruptcy Court his Amended Chapter 13 Plan. The Plan first required the debtor to complete the partially constructed home on the first lot and then to sell the newly-completed home the log cabin within two years of the Plan's confirmation.

Carl Riccitelli maintains that, in Fall 1996, George broke into his log cabin. On or about November 18, 1996, George requested Green mountain Power to turn on the cabin's power.

Approximately four days later, George Ricitelli reported a fire in the cabin. The structure was destroyed

completely by the fire. The debtor alleges the fire was caused when Green Mountain Power restored electricity to the malfunctioning and improperly- wired water heater.

In this adversary proceeding, the debtor has sued Green Mountain Power and the current holder and administrator of the mortgage on the log cabin, Girard Savings Bank and Wilshire Credit Corp. (hereinafter collectively referred to as "Wilshire"). The debtor has raised a number of theories of liability, including: trespass, negligence, breach of warranty, strict products liability , and negligent or intentional infliction of emotional distress.

The gravamen of the debtor's complaint against Green Mountain Power is that the company has a duty to inspect the log cabin before complying with George Riccitelli's request to turn on the power. Debtor's complaint against Wilshire, while less clear, seems to be that Wilshire breached a contractual obligation to use escrow account funds to purchase property insurance to protect his equity interest in the log cabin.

After a hearing on the defendants' motions for summary judgment on June 17, 1999, Judge Francis G. Conrad orally ruled:

> Before leaving Vermont,. . . . plaintiff did not tell Green Mountain Power to re-energize the property In the fall of 1996 George, the plaintiff's brother, apparently gained entry into the property. Some people claim he broke in, or whatever; apparently he regained entry. And, apparently, he asked Green Mountain Power to reenergize the property. Apparently, brother George turned on the main breaker, and on November 22nd the house was destroyed by fire . . . . And, essentially, the cabin is, that it is the responsibility of the power companies to inspect residences before energizing them and that they should not

have energized the property without the plaintiff's consent. Another fact here is, that the plaintiff does not claim that there was a defect in the amount of voltage supplied. This is not a high voltage consideration . . . .

Now the one issue that is so important here is, that for the plaintiff to prevail against Green Mountain Power, they [sic] are going to have to show there was proximate cause. When one reads the expert reports, and assuming for purposes of this ruling that Mr. Walker is entirely credible and that Mr. Dakin is credible, the jury would have to rule against the plaintiff because the evidence is [un]equivocal. There is no absolute proof as to what caused the fire. You need to show a duty. Your need to show a breach. You need to show causation. You need to show damages.

I think that the plaintiff here would be unable to show causation. By being unable to show causation, they [sic] would fail in their proof of negligence. As to trespass, I think that based upon the facts that have been presented, it would appear that there was reasonable reaction on the part of the Green Mountain Power to turn on the power, and I think that the plaintiff would fail also in proving that there was a trespass. There was permission to do that . . . .

Based upon those findings and particularly the facts in reference to the expert's reports, that I don't think the debtor will be able to, the plaintiff will be able to carry his burden of proof, this is an appropriate ruling under Rule 56. Green Mountain's Motion for Summary Judgment is granted in all respects.

June 17, 1999 Hearing Transcript at 23-29

Regarding the alleged liability of Wilshire, Judge Conrad reasoned :

But, in any event, the mortgage company, EMC Mortgage Corporation, aware that the plaintiff did not have insurance, purchased insurance on its own to protect its own but not the plaintiff's interest in the property. This type of property policy is called a force-placed policy. And it only protects the mortgagee's interest and not the owner's.

The Wilshire collected the unpaid principal balance due on the plaintiff's loan and applied that money directly against the debt owed to it by plaintiff and there was a deficiency. Plaintiff in this case claims that it was Wilshire's duty to purchase a replacement policy when it failed to get the insurance on the property. Such a policy, we all know would have insured the plaintiff's interest in the policy[sic].

Now, the various documents, when one looks at the facts of this case, and when you read them together, the plaintiff's argument, legally, just does not hold water. It is just – it doesn't work here. First of all common sense, and I always think that judges and lawyers should bring common sense, to the law, is that the mortgage company – and I have never seen this in any case and I was unable to find any cases under the set of facts here – has no duty to insure, and it would make sense, common sense, would be, they worried about their own interest and not the debtor's interest. And the fact that they charged the cost of these policies to the escrow account really is without merit because that is provided for in the loan documents.

Additionally, plaintiff has raised the argument that the lender may do and pay for whatever is necessary to protect the value of the property. I don't think this helps Mr. Riccitelli's case. First of all, the sentence is,

"Permissive and not mandatory." And while some banks may do this . The only thing they can do, and this is their choice, is that they can protect their own interest by getting their own insurance policy for their interest. In fact, some places have blanket policies which generally cover any of these situations in reference to the bank.

Moreover, when one looks at the commitment letter and mortgage deeds, one can only come to the firm conclusion that it was the plaintiff's duty to insure the mortgagee's interest and not the other way around. And, so, just because the plaintiff has failed to perform their duty, this does not create, as the plaintiff seems to argue, some reciprocal duty on the part of the mortgagee to insure the property.

June 17, 1999 Hearing Transcript at 31-35

Judge Conrad's ruling on Wilshire's Motion for Summary Judgment left open "whether the defendants obtained the full amount of available insurance proceeds from their insurance company, and how those proceeds were applied to the Plaintiff's loan, in order to determine what amount, if any, the Plaintiff may still owe to the defendants." June 30, 1999 Order. In a decision issued on June 28, 2000, Bankruptcy Judge Colleen A. Brown found:

By Defendant's own admission it did not collect the full amount of available insurance proceeds. According to Ms. Harman-Sera, the claim made to the insurance company was understated in the amount of $523.42. Defendant's claim thus is appropriately reduced by such amount, given that Defendant has charged Plaintiff for the cost of maintaining such insurance coverage.

Memorandum of Decision on Motion For Summary Judgment (filed June 28,2000) at 7-8

II. Discussion

A. Claims against Green Mountain Power

The debtor does not allege the electrical service Green Mountain Power supplied to the log cabin was defective either in voltage or transmission. Rather, the substance of his complaint is the company acted negligently when it turned on the power at his brother's request.

To avoid summary judgment, the debtor was required to present the Bankruptcy Court with evidence from which a reasonable jury could conclude the following: (1) the defendant must owe a legal duty to conform to a certain standard of conduct so as to have to protect the plaintiff from unreasonable risk of harm; (2) the defendant's must have committed a breach of this duty by failing to conform to the standard of conduct required; (3) the defendant's conduct must be the proximate cause of the plaintiff's injury; and (4) the plaintiff must have suffered actual loss or damage.

Langle v. Kurkul ,146 Vt. 513,517 (1986)

"[N]egligence can only spring from an unperformed duty." Guilmette v. Alexander, 128 Vt. 116,117 (1969). "Foresight of harm lies at the foundation of negligence." Id.

"Generally, a power company is under a duty of safeguarding the public against dangers arising from the use of dangerous agency of electricity to the extent of exercising reasonable care to correct or remove the cause of danger." Ives v. Central Vermont Pub. Serv. Corp. 134 Vt. 67,69 (1975). For example, "in regard to decayed trees or limbs, the power company's duty owed to the motoring public is limited to protecting its wires from possible falling trees by erecting the lines a safe distance away from known hazards." Id. (emphasis added). However, "[e]lectrical companies are not insurers of the safety of the

public." Bosley v. Central Vermont Pub. Serv. Corp., 127 Vt. 581,583 (1969)

The debtor has failed to demonstrate the defendant had a duty of care which it breached under these circumstances. It is undisputed that he did not instruct Green Mountain Power to leave his power off or to not honor a request from his brother to turn on his power. Furthermore, the debtor has presented no support for his contention that the company had a duty to foresee that a fire could start from his improperly rigged and maintained water heater. Finding such a duty as a matter of law would, in effect, require an electricity provider to inspect the appliances inside every premises and check for owner misuse before honoring an apparently valid request to turn on the power, a patently absurd result. See Baisley v. Missisquoi Cemetery Ass'n, 167 Vt. 473,480 (1998) ("In applying this standard, we must consider the consequences that a prudent person might have anticipated,"). The Bankruptcy Court properly granted summary judgment in favor of Green Mountain Power.

In addition, as noted by Judge Conrad, the record contains insufficient evidence from which a jury could conclude Green Mountain Power proximately caused the fire. The only evidence of causation proffered by the debtor was a conclusory, unsigned affidavit from an electrician. By contrast, the state fire investigator offered no opinion as to cause or origin of the fire. See June 17, 1999 Hearing Transcript at 24. These factors, when coupled with the trespass of his brother on the property, provide sufficient ground for granting summary judgment since the debtor failed to provide evidence of causation. See Marshall v. Milton Water Corp., 128 Vt. 609,612 (1970) ("If the evidence is so tenuous that a verdict based upon it must be set aside, the direction of a verdict is proper.")

B. Claims against Wilshire

The debtor claims Wilshire had a contractual obligation to maintain replacement cost insurance coverage and to rebuild his log home. See Mortgage Deed (appended to Paper 17 as Exhibit E). The contractual provisions upon which the debtor relies, when read in a common sense manner, address his obligation to obtain insurance to protect both his own investment and Wilshire's interest in the property. Several provisions also provide Wilshire with the right to protect its own interest in the event the debtor failed to do so. See generally Memorandum of Decision (filed June 29, 2000) at para. 5 (noting that Wilshire could only obtain insurance for its own insurable interest, "the unpaid principal balance"). None of the provisions, however, obliged Wilshire to provide the debtor with replacement cost insurance. Therefore, the Bankruptcy Court appropriately granted summary judgment in favor of Wilshire.

III. Conclusion

The Court has considered the debtor's remaining claims and finds them to be without merit. The judgment of the Bankruptcy Court is AFFIRMED. SO ORDERED.

Dated at Brattleboro, Vermont this 15th day of November, 2000 ©S.J. Garvan Murtha, Chief Judge

1b (a)

APPENDIX A : UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CARL RICCITELLI,
Appellant,

v.

GREEN MOUNTAIN POWER CORPORATION
WILSHIRE CREDIT CORP.
GIRARD SAVINGS BANK,
Appellees,

) JUDGMENT
) IN A CIVIL CASE
)CASE # 1:00-CV-297

___ Jury Verdict. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Memorandum of Decision (Paper No. 22)filed November 15, 2000, the Court AFFIRMS the Judgment of the Bankruptcy Court.

Date : November 16, 2000
RICHARD PAUL WASKO,
Clerk

C L Sherbaak
(By) Deputy Clerk

JUDGMENT ENTERED ON DOCKET
DATE: 11/16/00

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED 2000 NOV.16 A :59